



## U.S. Copyright Office

### 37 CFR Part 223

[Docket No. 2021-4]

#### Small Claims Procedures for Library and Archives Opt-Outs and Class Actions

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Final rule.

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**SUMMARY:** The U.S. Copyright Office is issuing a final rule regarding the procedures for libraries and archives to preemptively opt out of proceedings before the Copyright Claims Board (“CCB”) and the procedures for a party before the CCB with respect to a class action proceeding, under the Copyright Alternative in Small-Claims Enforcement Act of 2020.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Megan Efthimiadis, Assistant to the General Counsel, by email at [meft@copyright.gov](mailto:meft@copyright.gov), or by telephone at 202–707–8350.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020<sup>1</sup> directs the Copyright Office to establish the Copyright Claims Board (“CCB” or “Board”), a voluntary tribunal within the Office comprised of three Copyright Claims Officers who have the authority to render determinations on certain copyright claims for economic recoveries under the statutory threshold. The Office issued a notification of inquiry (“NOI”) to describe the CASE Act’s legislative background and regulatory scope

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<sup>1</sup> Pub. L. 116-260, sec. 212, 134 Stat. 1182, 2176 (2020).

and to ask for public input on various topics, including procedures addressing a preemptive opt-out from CASE Act proceedings (sometimes referred to as a “blanket” opt-out) for libraries and archives and procedures associated with class actions.<sup>2</sup>

The CASE Act directs the Register of Copyrights to “establish regulations allowing for a library or archives that does not wish to participate in proceedings before the Copyright Claims Board to preemptively opt out of such proceedings.”<sup>3</sup> The Office must also “compile and maintain a publicly available list of the libraries and archives that have successfully opted out of proceedings.”<sup>4</sup> For a library or archives to qualify for the opt-out election, it must “qualif[y] for the limitations on exclusive rights under section 108 [of title 17].”<sup>5</sup>

The CASE Act also provides that the Register will establish procedures for a claimant “who receives notice of a pending class action, arising out of the same transaction or occurrence as the proceeding before the [CCB],” including the ability to “opt out of the class action.”<sup>6</sup>

In September 2021, the Office published a notice of proposed rulemaking (“NPRM”) addressing these two topics in depth and proposing regulatory language.<sup>7</sup> In both the NOI and the NPRM, the Office requested input on issues related to the library

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<sup>2</sup> 86 FR 16156, 16161 (Mar. 26, 2021).

<sup>3</sup> 17 U.S.C. 1506(aa)(1).

<sup>4</sup> *Id.* at 1506(aa)(2)(B).

<sup>5</sup> *Id.* at 1506(aa)(4). The CASE Act’s legislative history does not discuss the library and archives opt-out provision. *See generally* S. Rep. No. 116-105 (2019); H.R. Rep. No. 116-252 (2019) (Note, the CASE Act’s legislative history cited is for the CASE Act of 2019, S. 1273, 116th Cong. (2019) and H.R. 2426, 116th Cong. (2019), bills largely identical to the CASE Act of 2020, with the notable exception that these earlier bills did not contain the libraries and archives opt-out provision.).

<sup>6</sup> *Id.* at 1507(b)(2).

<sup>7</sup> 86 FR 49273 (Sept. 2, 2021). Comments received in response to the March 26, 2021 NOI and September 2, 2021 NPRM are available at <https://www.regulations.gov/document/COLC-2021-0001-0001/comment> and <https://www.regulations.gov/document/COLC-2021-0003-0001/comment>, respectively. References to these comments are by party name (abbreviated where appropriate), followed by “Initial NOI Comments,” “Reply NOI Comments,” or “NPRM Comments,” as appropriate.

and archives opt-out provision, including whether the Office should require proof or a certification that a library or archives qualifies for the opt-out provision; which entities, principals, or agents should be allowed to opt out on behalf of a library or archives; how the opt-out provision would apply to library or archives employees; and various transparency and functionality considerations related to publication of the opt-out list.<sup>8</sup> Commenters were generally supportive of the proposed library and archives opt-out regulations, with the exception of the matters addressed below. No parties submitted comments addressing the proposed class action regulations. The Office is adopting the proposed class action regulations with one clarification, as addressed below.

## **II. Discussion of Final Rule**

### **A. Proof or Certification Requirement**

The Office’s NPRM proposed “that any library or archives that wishes to take advantage of the statutory preemptive opt-out option must submit a self-certification that it ‘qualifies for the limitations on exclusive rights under section 108.’”<sup>9</sup> The Office explained that this requirement could “balance the statutory goals of ensuring that *only* libraries and archives are eligible for a preemptive opt-out, but also that any such entities are not overly burdened in effecting that election.”<sup>10</sup> The proposed rule also stated that any library or archives that had preemptively opted out, but that was later found by a federal court not to qualify for the section 108 exemptions, must report this finding to the CCB.

The Office proposed to “accept the facts stated in the opt-out submission unless they are implausible or conflict with sources of information that are known to the Office

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<sup>8</sup> 86 FR at 16161; 86 FR at 49274–77.

<sup>9</sup> 86 FR at 49275 (quoting 17 U.S.C. 1506(aa)(4)).

<sup>10</sup> *Id.*

or the general public.”<sup>11</sup> Where the CCB believes that an entity does not qualify under section 108, that entity would be not be added to, or would be removed from, the preemptive opt-out list. The Office would communicate its conclusion and its intent to either not add the entity to the preemptive opt-out list or remove the entity from that list, as appropriate, and would allow the entity to provide evidence supporting its qualification for the exemption within 30 days of the Office’s notice. If the Register subsequently determined that the evidence submitted by the entity demonstrates that it qualifies under section 108, the entity would be added to, or remain on, the preemptive opt-out list. The Office did not believe it was necessary to establish a separate adversarial procedure for parties to raise objections that an entity does not qualify for the opt-out list. Instead, the Office proposed that claimants who attempt to bring claims against entities on the opt-out list can assert that the subject library or archives does not qualify for inclusion on the list as part of their claim.<sup>12</sup>

The American Association of Law Libraries (“AALL”) supported the self-certification provision, calling it “[e]specially important” and one of several provisions that would allow easy and efficient opt-out elections.<sup>13</sup> The Niskanen Center also favored the self-certification approach, but suggested that any misrepresentation penalty “should not necessarily be perjury,” and that “any sanctions applied (other than the loss [of] the ability to opt out as defined in the Act) should only be applied if the party which made

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<sup>11</sup> *Id.* The Office takes a similar approach regarding registration materials. *See* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 309.2 (3d ed. 2021).

<sup>12</sup> 86 FR at 49275.

<sup>13</sup> Am. Ass’n of L. Libraries (“AALL”) NPRM Comments at 1; *see also* AALL Initial NOI Comments at 1–2 (noting that a self-certification approach “would meet the intent of Congress, which created the preemptive opt out for libraries and archives to provide an efficient and streamlined system for these organizations and to help them avoid the burdensome administrative requirements of repeated opt outs”).

the misrepresentations did so with intent.”<sup>14</sup> Those representing libraries generally favored self-certification.<sup>15</sup>

Other commenters suggested that a self-certification process could lead to fraudulent opt-outs<sup>16</sup> and would lead to delays or inefficiencies in CCB proceedings.<sup>17</sup> Some supported a requirement that any certifications be made under penalty of perjury.<sup>18</sup> Commenter Terisa Shoremount suggested that the Office should require “a short statement about the entity’s basis for qualifying to opt-out,” which would “not overly burden libraries and archives” and “could promote efficiency,” and that publishing this statement on the library and archives opt-out list would increase transparency by “allow[ing] potential adversaries to view why the library or archive[s] qualifies which may reduce opt-out status challenges.”<sup>19</sup>

Regarding the effect of a library or archives opt-out election, the Copyright Alliance et al. reiterated their position that these regulations “should clearly state that a

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<sup>14</sup> Niskanen Ctr. NPRM Comments at 2.

<sup>15</sup> See Library Copyright All. (“LCA”) Initial NOI Comments at 1; Univ. of Mich. Library Initial NOI Comments at 4–5; Univ. Infor. Pol’y Officers Reply NOI Comments at 1.

<sup>16</sup> Sci. Fiction & Fantasy Writers of Am. (“SFWA”) NPRM Comments at 2 (noting the potential for “Internet pirates” who “describe themselves as ‘libraries’ or ‘archives’ to mislead others” who would try to use the blanket opt-out option); Am. Intell. Prop. L. Ass’n (“AIPLA”) Initial NOI Comments at 4; Copyright Alliance, Am. Photographic Artists, Am. Soc’y for Collective Rights Licensing, Am. Soc’y of Media Photographers, The Authors Guild, CreativeFuture, Digital Media Licensing Ass’n, Graphic Artists Guild, Indep. Book Pubs. Ass’n, Music Creators N. Am., Nat’l Music Council of the U.S., Nat’l Press Photographers Ass’n, N. Am. Nature Photography Ass’n, Prof. Photographers of Am., Recording Academy, Screen Actors Guild-Am. Fed. of Television and Radio Artists, Soc’y of Composers & Lyricists, Songwriters Guild of Am. & Songwriters of N. Am. (“Copyright Alliance et al.”) Reply NOI Comments at 12–13 (“To allow entities to ‘self-certify’ would be to open the blanket opt out to any entity claiming to be a ‘library’ or ‘archive’ regardless of whether the entity rightfully qualifies under the law.”).

<sup>17</sup> SFWA NPRM Comments at 2–3 (noting concerns that a library or archives would remain on the opt-out list until the CCB makes a final determination on its status and suggesting that the CCB should thus “refrain from granting the entity status as a library or archives until such time as it has conducted an adequate review”).

<sup>18</sup> Copyright Alliance et al. NPRM Comments at 6; SFWA Reply NOI Comments at 2 (agreeing that a “library or archive[s] should make its declaration under penalty of perjury”); *see also* Copyright Alliance et al. Initial NOI Comments at 20 (supporting that opt-out elections should be made under “penalty of perjury” and voicing concerns related to courts relying on an Office or CCB section 108 qualification determination).

<sup>19</sup> Terisa Shoremount NPRM Comments at 1.

determination by the CCB regarding an entity's status as qualifying for the blanket opt-out should not be relied upon or cited by any other tribunal in determining whether an entity qualifies for the exceptions under section 108 of the Copyright Act.”<sup>20</sup> Relatedly, the Science Fiction and Fantasy Writers of America “strongly advise[d] the [Office] to refrain from placing entities on its list of libraries and archives that have opted out if those entities are parties in ongoing, related litigation,” believing that the Office’s “official acceptance of a self-serving declaration could well affect the course of the judicial proceeding and its ultimate outcome.”<sup>21</sup> They also suggested that the CCB hold its determination in abeyance pending ongoing litigation.<sup>22</sup> The Niskanen Center also argued that the Copyright Office should make a determination whether a library or archives qualifies for the opt-out, “only if there are no appeals pending in superior courts.”<sup>23</sup>

The Office believes that the proposed rule addresses commenters’ concerns, but will include additional language in the final rule confirming that the CCB’s acceptance of an entity’s representation regarding its qualifying status for the preemptive opt-out does not constitute a legal conclusion by the Board or the Register of Copyrights for any other purpose. To help identify the entity that is seeking to preemptively opt out of CCB proceedings, the final rule will require those libraries and archives that have a website to supply its address. Further, the requirement that any certification must be made under the penalty of perjury will deter fraudulent submissions and, as the federal law prohibiting

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<sup>20</sup> Copyright Alliance et al. NPRM Comments at 6; *see also* MPA, RIAA & SIIA Reply NOI Comments at 10; LCA Reply NOI Comments at 1–2.

<sup>21</sup> SFWA NPRM Comments at 3.

<sup>22</sup> *Id.*

<sup>23</sup> Niskanen Ctr. NPRM Comments at 2.

fraudulent statements made to legislative agencies already requires an intent element,<sup>24</sup> the rule does not need to include a separate intent element.

Finally, the Office does not believe the CCB should be required to hold its determination in abeyance pending appeals or ongoing litigation where an entity's qualification for section 108 is at issue. As federal litigation can take years to resolve, waiting for a court's final determination regarding a purported library's or archives' status could undercut the CCB's value in resolving claims expeditiously. Further, if the court ultimately determines that the entity qualifies under section 108, the claimant could unwittingly exhaust the statute of limitations. Importantly, the preemptive opt-out option only offers a jurisdictional privilege—respondents can always opt out of individual CCB proceedings, even if the preemptive opt-out is unavailable.

## **B. Opt-Out Election Timing and Disqualification**

The NPRM stated that “[t]he Office will accept the facts stated in the opt-out submission unless they are implausible or conflict with sources of information that are known to the Office or the general public.”<sup>25</sup> The proposed rule also required that “any library or archives that has been found by a federal court not to qualify for the section 108 exemptions report this information to the CCB.”<sup>26</sup> In either circumstance, the entity would not be added to, or would be removed from, the opt-out list. Third parties would not be allowed to challenge an entity's preemptive opt-out eligibility, separate from the CCB's adjudication of individual cases.<sup>27</sup> The proposed rule did not address the review criteria and standards by which a library or archives would not be added to, or be

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<sup>24</sup> See 18 U.S.C. 1001(a)(3) (requiring that any document submitted to a Federal agency must be “materially false, fictitious, or fraudulent statement or entry” and made “knowingly and willfully” to be a violation).

<sup>25</sup> 86 FR at 49275 (citing U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 309.2 (3d ed. 2021)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

removed from, the opt-out list; the effect of such a removal; and the timing of an opt-out election with respect to active claims.

Commenters asked the Office to clarify rules related to these issues. With respect to the CCB's review criteria and standards, the Science Fiction and Fantasy Writers of America and Copyright Alliance et al. each noted that the proposed regulations do not identify either a review scope or timeline for when the CCB must evaluate whether a library or archives qualifies for the preemptive opt-out list.<sup>28</sup> The Copyright Alliance et al. suggested that "[t]he scope of the review in the library and archives opt-out context would require, at minimum, a simple web search to determine if in fact the facts stated within the opt-out submission are in conflict with information known to the public" and, further, that "it is unclear whether the Office intends to take a ministerial approach, whereby it places entities on the list with little or no initial review, with the ability to later remove those entities, or if it will take a more proactive and discretionary approach, whereby it reviews each submission before placing the entity on the list, while maintaining the ability to remove the entity later if appropriate," concluding that it preferred the "proactive and discretionary" approach.<sup>29</sup> The Science Fiction and Fantasy Writers of America stated that the CCB should have "the affirmative obligation to look beyond a mere declaration in determining whether an entity is actually a library or archive[s] in accordance with case law when there is strong reason to do so."<sup>30</sup> Taking an opposing view, the Niskanen Center stated that it would be preferable for an Article III court to handle disputes over whether an entity qualifies as a library or archives under section 108, elaborating that "[t]his would reduce the burden on the Copyright Office and the Copyright Claims Board and keep implementation within the spirit of the CASE Act

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<sup>28</sup> Copyright Alliance et al. NPRM Comments at 7–8; SFWA NPRM Comments at 2–3.

<sup>29</sup> Copyright Alliance et al. NPRM Comments at 7–8.

<sup>30</sup> SFWA NPRM Comments at 2.



as an efficient-low cost tool to *apply* legal questions which have already been answered by a traditional Article III Court.”<sup>31</sup>

The Office concludes that the NPRM approach, which neither requires nor prohibits the CCB from inquiring into whether an entity qualifies for the library and archives preemptive opt-out election, appropriately balances efficiency and the need to exclude ineligible entities. The aforementioned additional requirement to supply a website address in the opt-out request should help flag whether the entity qualifies for the opt-out election. The Office also believes that a modification to the procedure when a claim is filed against a library or archives that is included on the opt-out list will result in greater efficiency. As provided in the proposed rule, a claim filed against a library or archives on the opt-out list must assert material factual allegations supporting the claimant’s challenge to the subject library’s or archives’ eligibility for the opt-out. The Office concludes that an initial determination of the viability of the challenge will be made prior to approving service of the claim. If the claim’s allegations are colorable, the CCB will notify the subject library or archives of the challenge to its qualifications and the library or archives will have an opportunity to provide evidence supporting its qualifications before a decision is made either to dismiss the claim against it or to remove the entity from the opt-out list and allow the claim to proceed to compliance review. As mentioned above, if the claim is permitted to proceed, the respondent entity would retain the ability to opt out of the individual claim.

The Copyright Alliance et al. also suggested that an entity that fails to notify the Office of changes in relevant contact information or of a determination by a court that it does not qualify for the section 108 exceptions should lose the ability to preemptively opt

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<sup>31</sup> Niskanen Ctr. NPRM Comments at 2 (citing 17 U.S.C. 1506(a)(1)).

out of CCB proceedings.<sup>32</sup> The Office believes that the CCB should be able to take any reasonable corrective action against a library or archives that violates these regulations. While a court determination that a library or archives does not qualify for section 108 will automatically result in the entity losing the ability to preemptively opt out of CCB proceedings, the CCB may determine that willful conduct or a pattern of noncompliance should have the same result, although the Office anticipates that such corrective action would be necessary on only rare occasions.

With respect to the effective date of a preemptive opt-out election, the Copyright Alliance et al. argued that such an election should be “forward reaching only” and not apply to any claims that were filed against the libraries or archives before they were added to the publicly available list, even if their opt-out request had been filed and was under review prior to the filing date of the claim.<sup>33</sup> Alternatively, they asked that “any fees paid by the claimant [be] refundable if a claimant is prevented from moving forward with a case because the library or archives had filed to preemptively opt-out before the case was filed.”<sup>34</sup>

The Office agrees that the statute clearly provides that the opt-out election for library and archives should be prospective, because it is a *preemptive* election. Accordingly, once a claimant has been instructed by the CCB to serve its claim on an entity, a subsequently-approved preemptive opt-out election would not apply to that claim. In that situation, the library or archives would be in the same position as other respondents and may file an opt-out election to the specific claim.

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<sup>32</sup> Copyright Alliance et al. NPRM Comments at 7 (“In both instances, we believe that the ability of a library or archives to take advantage of the privilege of a blanket opt-out should be contingent on it properly notifying the Office of these changes.”).

<sup>33</sup> Copyright Alliance et al. NPRM Comments at 6.

<sup>34</sup> *Id.*

The Office acknowledges that there could be a situation where an entity has submitted its application for the preemptive opt-out, but its application is filed or still under review at a point in time when the CCB has already found a claim against the entity to be compliant and has instructed the claimant to serve the claim. To provide for this limited situation, the Office concludes that the effective date of a preemptive opt-out request is the date the library or archives is added to the public opt-out list.<sup>35</sup> Practically, this should not pose a significant problem for entities seeking to opt out preemptively, as the opt-out election will become available to libraries and archives in advance of the CCB beginning operations, and new opt-out elections should be available on the opt-out list as soon as feasible after receipt. Where a prospective claimant is concerned that a library or archives may have submitted an opt-out election that has not yet posted on the CCB's website, that claimant is encouraged to contact the CCB before submitting its claim to inquire whether the entity has submitted a form that has not yet been processed.

If a library or archives intends to opt out of a pending claim and also submit a preemptive opt-out for future claims, it should file both a proceeding-specific opt-out election and a preemptive opt-out election.

### **C. Transparency and Public Content**

The NPRM reflected the Office's agreement with commenters who suggested that "the list of libraries and archives that have preemptively opted out of participating in CCB proceedings should be made publicly available online."<sup>36</sup> Responding to the NPRM, parties commented that this information should be made available as soon as possible

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<sup>35</sup> The one exception to this rule is for library and archives opt-out elections that are filed before this rule's effective date. These filings will become effective on the rule's effective date. This provision will allow more time for libraries and archives to make an opt-out election far in advance of the date that the CCB commences operations, and addresses the circumstance that the libraries and archives opt-out form will be posted before this rule's effective date.

<sup>36</sup> 86 FR at 49276 (citing AIPLA Initial NOI Comments at 5; Copyright Alliance et al. Initial NOI Comments at 21; LCA Initial NOI Comments at 2.).

after being received.<sup>37</sup> The Niskanen Center further suggested allowing users to view the entire opt-out list or to allow users to search the list “by state, locality, type of institution (e.g. library or archive), and name.”<sup>38</sup> AALL suggested that the Office include more information “geared toward potential respondents,” which would help law librarians and legal information professionals learn about the opt-out provision and their rights and responsibilities with the CCB.<sup>39</sup> AALL also offered “to collaborate with the Copyright Office on a webinar or other educational programs and resources about the CCB geared toward law librarians and legal information professionals.”<sup>40</sup>

Although these comments do not require amendments to the proposed rule, the Office can confirm that the initial opt-out list will be posted in Portable Document Format (“PDF”), and will be updated as soon as feasible after receipt and approval of preemptive opt-out requests. While the PDF will be generally searchable, the Office hopes to add additional search functionality in any future technology updates. The Office also confirms that there will be information provided on its website and on the CCB website, when it launches, directed at libraries and archives regarding the availability and impact of the preemptive opt-out. Finally, the Office and CCB welcome collaboration on CCB-related outreach from all interested parties.

#### **D. Application of the Opt-Out Provision to Persons Acting in the Course of Their Employment**

The CASE Act is silent on whether a library’s or archives’ preemptive opt-out election would apply to those entities’ employees acting within the scope of their

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<sup>37</sup> See Copyright Alliance et al. NPRM Comments at 8 (“Ideally, the list will be updated immediately upon any changes . . . but, at minimum, the list should be updated biweekly.”); Niskanen Ctr. NPRM Comments at 3 (“The Copyright Office and the Copyright Claims Board should make as available as possible the opportunity to look up which institutions have chosen the blanket opt-out option.”).

<sup>38</sup> Niskanen Ctr. NPRM Comments at 3.

<sup>39</sup> AALL NPRM Comments at 1–2.

<sup>40</sup> *Id.* at 2.

employment. In its NOI, the Office asked whether it “should include a regulatory provision that specifies that this opt out extends to employees operating in the course of their employment.”<sup>41</sup> Those representing libraries and archives supported such a rule, while other commenters were opposed. The NPRM as issued did not include a provision to extend a preemptive opt-out election to libraries’ or archives’ employees.

In initially declining to include such a provision, the Office made two observations. The first was that under agency law, “[u]nless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.”<sup>42</sup> The second observation was that “the CASE Act expressly offers the preemptive opt-out option to ‘a library or archives,’ but does not mention employees.”<sup>43</sup>

Numerous commenters representing libraries or archives responded that the final rule should extend a library’s or archives’ preemptive opt-out election to cover those entities’ employees.<sup>44</sup> The Office received many similar comments from employees of libraries or archives stating that these employees “would be unable to perform [their]

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<sup>41</sup> 86 FR at 16161.

<sup>42</sup> 86 FR at 49276.

<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.,* Ass’n of Am. Univs. NPRM Comments at 1; Ass’n of Southeastern Research Libraries, Greater Western Library All., & Triangle Research Libraries Network (“ASERL, GWLA & TRLN”) NPRM Comments at 1; Univ. Infor. Pol’y Officers NPRM Comments at 2–4; LCA NPRM Comments at 1–3; Univ. of Cal., Berkeley NPRM Comments at 1–3; Harvard Library NPRM Comments at 1–3; Software Preservation Network NPRM Comments at 2; Univ. of Mich. Library NPRM Comments at 1–2; Univ. of N. Tex. Libraries NPRM Comments at 1; Niskanen Ctr. NPRM Comments at 3–4; Cornell Univ. Library NPRM Comments at 1–2; Univ. of N.C., Chapel Hill Univ. Libraries NPRM Comments at 1; Kent State Univ. Libraries NPRM Comments at 1; Duke Univ. Libraries NPRM Comments at 1–2; SPARC NPRM Comments at 1; Univ. of Nebraska NPRM Comments at 1; AALL NPRM Comments at 1; Va. Commonwealth Univ. Libraries NPRM Comments at 1–2; Columbia Univ. Libraries NPRM Comments at 1; UCLA Library NPRM Comments at 1–2; SAA NPRM Comments at 1–2; Univ. of Fla. Smathers Libraries NPRM Comments at 1; *see also* Fight for the Future NPRM Comments. While one commenter voiced their opposition “to permitting pre-emptive opt-outs by individuals who claim to be employees of websites responsible for uploading infringing material,” SFWA NPRM Comments at 3–4, it is unclear whether this party is addressing a specific circumstance related to libraries or archives who provide materials online or to libraries’ and archives’ employees, generally.

regular daily work for fear of liability if the preemptive opt out does not cover employees.”<sup>45</sup>

Other comments in support of including a regulatory provision addressing employees broadly made three legal arguments. The first argument responded to the Office’s observations regarding agency law and generally asserted that including employees with a library’s or archives’ opt out is consistent with other principles of agency law or is not inconsistent with agency law.<sup>46</sup> In particular, commenters noted that under agency law, a principal (the library or archives) may delegate a privilege (the preemptive opt-out election) to an agent (their employees).<sup>47</sup> University Information Policy Officers reasoned that, “[i]f participation in the CASE Act adjudication process is akin to liability, then the opt[-]out provision in the statute is akin to a privilege, and ‘[m]ost privileges held by a principal may be delegated to an agent.’”<sup>48</sup> University Information Policy Officers further argued that an agent whom the principal directed to perform an act cannot be held liable if a principal cannot be held liable for performing the act, even if the agent would have been liable absent this privilege.<sup>49</sup>

It is not clear, however, the extent to which the cited agency law principles are applicable here. The preemptive opt-out is not a liability privilege, but rather a privilege to preemptively elect to decline using an optional tribunal to determine a copyright claim,

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<sup>45</sup> See, e.g., Abby Nafziger NPRM Comments at 1. *But see*, e.g., Abby Adams NPRM Comments at 1 (omitting this claim from an otherwise substantially similar comment).

<sup>46</sup> See *id.* at 1–2 (stating that agency law does not prohibit a principal from taking action on behalf of an agent, so extending the preemptive opt out to employees is not inconsistent with agency law); Ass’n of Am. Univs. NPRM Comments at 1 (stating that the inclusion of employees would be consistent with agency law principles “[i]n accordance with current law”); Univ. Infor. Pol’y Officers NPRM Comments at 3.

<sup>47</sup> See Univ. Infor. Pol’y Officers NPRM Comments at 3; LCA NPRM Comments at 1–2; Univ. of Cal. Libraries NPRM Comments at 2–3; Software Preservation Network NPRM Comments at 2.

<sup>48</sup> Univ. Infor. Pol’y Officers NPRM Comments at 3 (citing 2 Restatement (Third) of Agency at 122).

<sup>49</sup> See *id.* (citing *PYCA Indus., Inc. v. Harrison Cty. Waste Water Mgmt. Dist.*, 177 F.3d 351, 378–79 (5th Cir. 1999)).

or a “jurisdictional privilege.”<sup>50</sup> As the University of California correctly observes, the CASE Act does not “create[] or waive[] tort liability by principals or agents.”<sup>51</sup> Considering the differences between liability privileges and jurisdictional privileges, principles governing the former may not be determinative for the latter.

The second argument made by commenters supporting extending a library’s or archives’ opt-out election to its employees related to the texts of both the CASE Act and the Copyright Act. Commenters recognized that the libraries’ and archives’ preemptive opt-out provision does not have any associated legislative history,<sup>52</sup> including in the Office’s *Copyright Small Claims* policy report, as it was a late amendment in the legislative process.<sup>53</sup> Therefore, they made legislative intent arguments based on the statutory language itself.

The CASE Act does not define a “library” or “archives” as including or excluding employees, but applies the preemptive opt-out election to “any library or archives, respectively, that qualifies for the limitations on exclusive rights under section 108.”<sup>54</sup> Commenters argued that since section 108’s limitations include employees,<sup>55</sup> the CASE Act’s libraries and archives opt-out election should also apply to them.<sup>56</sup> It is true that some of section 108’s provisions, namely 108(a), (f)(1), and (g), explicitly extend statutory exemptions to a library’s or archives’ employees, but section 108(h), which exempts enforcement of certain display or performance rights, does not do so.<sup>57</sup> At the

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<sup>50</sup> Univ. of Cal., Berkeley NPRM Comments at 3 (emphasis omitted).

<sup>51</sup> *Id.*

<sup>52</sup> UCLA Library NPRM Comments at 1; Univ. Infor. Pol’y Officers NPRM Comments at 2; Software Preservation Network NPRM Comments at 2.

<sup>53</sup> No earlier copyright small claims bill contained this provision. *See* S. 1273, 116th Cong.; H.R. 2426, 116th Cong.; H.R. 3945, 115th Cong. (2017); H.R. 6496, 114th Cong. (2016).

<sup>54</sup> 17 U.S.C. 1506(aa)(4).

<sup>55</sup> *Id.* at 108(a), (f)(1).

<sup>56</sup> Niskanen Ctr. NPRM Comments at 3–4; Univ. of Cal. Libraries NPRM Comments at 2 n.8.

<sup>57</sup> 17 U.S.C. 108(h).

same time, the exempted actions described in this subsection cannot occur without the employees of libraries or archives engaging in the described conduct at the direction of their employers. While not conclusive, in light of the above, the treatment of employees in section 108 overall weighs in favor of extending the preemptive opt-out to employees in the CASE Act.

Finally, commenters made related policy arguments that Congress must have intended to include employees, even though the statutory text is not explicit.<sup>58</sup> Many noted that libraries and archives must act through their employees,<sup>59</sup> with the University of Michigan Library suggesting that “there is no alleged infringement claim against a library that cannot also be brought against a corresponding library employee.”<sup>60</sup> Other commenters suggested that excluding employees from a library’s or archives’ preemptive opt-out election would result in those libraries and archives becoming involved in CCB proceedings on behalf of those employees and would effectively “hollow out the important intentional protections” for libraries and archives in both the Copyright Act and CASE Act.<sup>61</sup> As the University of North Texas Libraries observed, “[e]ven in cases where [a claim before the CCB] does not move forward or where an individual chooses to opt out, the employing library will not truly be able to opt out of CCB proceedings when considerable education and support for individual employees is necessary to

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<sup>58</sup> See, e.g., Univ. Infor. Pol’y Officers NPRM Comments at 2–3; LCA NPRM Comments at 2–3; Univ. of Cal., Berkeley NPRM Comments at 1; Harvard Library NPRM Comments at 2; Software Preservation Network NPRM Comments at 2; Univ. of Minn. Libraries NPRM Comments at 1; Univ. of N. Tex. Libraries NPRM Comments at 1; ASERL, GWLA & TRLN NPRM Comments at 1; Niskanen Ctr. NPRM Comments at 3–4; Cornell Univ. Library NPRM Comments at 1–2; Univ. of N.C., Chapel Hill Univ. Libraries NPRM Comments at 1.

<sup>59</sup> See, e.g., Harvard Library NPRM Comments at 2; Univ. of N. Tex. Libraries NPRM Comments at 1; Univ. of Minn. Libraries NPRM Comments at 2; Kent State Univ. Libraries NPRM Comments at 1; Univ. of Mich. Library NPRM Comments at 1.

<sup>60</sup> Univ. of Mich. Library NPRM Comments at 1.

<sup>61</sup> SPARC NPRM Comments at 1; see also Ass’n of Am. Univs. NPRM Comments at 1; Univ. of Mich. Library NPRM Comments at 1; Univ. of Minn. Libraries NPRM Comments at 1; ASERL, GWLA & TRLN NPRM Comments at 1; Univ. of Cal. Libraries NPRM Comments at 1–2.



navigate this process.”<sup>62</sup> The Niskanen Center argued that it would be “inconsistent” with the CASE Act’s intent “to create a situation where an employee’s failure to opt-out might result in the library becoming enmeshed in the CCB proceeding on behalf of the employee”<sup>63</sup> and that this would result in libraries needing to “monitor [their] employees’ receipt of any claims or rely on employees to report claims themselves, a burdensome process with a high risk of potential error.”<sup>64</sup>

Upon careful evaluation of the statute and the submitted comments, the Office is amending the proposed rule to include a regulatory provision addressing libraries’ and archives’ employees. The final rule will apply a library’s or archives’ opt-out election to both the qualifying entity and its employees for activities within the employee’s scope of employment. As discussed above, neither the statutory language nor agency law conclusively resolves this issue. The Office therefore looks to the underlying intent and purpose of the CASE Act as a whole for guidance.

As the Office noted in its March 2021 NOI, “the statute and legislative history make clear that Congress intended for the Office to implement regulations in a manner that ‘furthers the goals of the Copyright Claims Board’ and establishes an ‘efficient, effective, and voluntary’ forum for parties to resolve their disputes.”<sup>65</sup> While excluding employees of a library or archives from the preemptive opt-out would allow employee respondents to make their own independent decisions about participating in a CCB proceeding, commenters have made a persuasive argument that a rule that excluded employees acting within the scope of their employment would be generally inconsistent with the section 108 provisions extending statutory exemptions to a library or archive’s

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<sup>62</sup> Univ. of N. Tex. Libraries NPRM Comments at 1.

<sup>63</sup> Niskanen Ctr. NPRM Comments at 4 (quoting LCA Reply NOI Comments at 1).

<sup>64</sup> *Id.*

<sup>65</sup> 86 FR at 16157 (quoting 17 U.S.C. 1510(a)(2)(A) and H.R. Rep. No. 116–252, at 23 (footnotes omitted)).

employees, and that the absence of a rule extending the library's or archives' opt-out to its employees could create unnecessary complexity, uncertainty, and inefficiency, frustrating Congress's goals in passing the CASE Act. Pursuant to its authority under 17 U.S.C. 702 and 1510(a)(1) and to best reflect the statute's goals in light of the rulemaking record, the Office is adopting final regulations to address the statutory ambiguity with respect to whether the library and archives preemptive opt-out election applies to employees acting within the course of their employment. In doing so, the Office is exercising its plenary regulatory authority to "develop clear regulations and practices to fairly balance the competing interests of claimants and respondents," as Congress directed.<sup>66</sup>

Without such a rule, a library or archives that decided to preemptively opt-out of CCB proceedings could, by law or practice,<sup>67</sup> be compelled to participate in such a proceeding to defend an employee who did not timely opt out individually. Employees could also be placed in a position where they had to defend employer-directed actions on their own. Further, the practical effect of not including employees in the opt-out election of the library or archives could result in unnecessary costs for copyright owners; for example, infringement claims that would normally be jointly brought against the library or archives and its employee could end up being brought in two venues—federal court and the CCB. The Office concludes that it is more consistent with Congressional intent behind the CASE Act to allow libraries and archives to opt out of CCB proceedings without their employees who acted within the scope of their employment being required to file their own proceeding-specific opt-out elections.

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<sup>66</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in the statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.") (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>67</sup> Kent State University Libraries stated that "many state institutions, including in the State of Ohio, are legally obligated to represent state employees acting in the scope of their employment." Kent State Univ. Libraries NPRM Comments at 1.

## **E. Class Action Opt-Out Elections**

Finally, the rule clarifies the CCB's ability to resolve conflicts between CCB proceedings and class action cases arising from the same transaction or occurrence in which a party before the CCB is a class member. If a party in an active proceeding "receives notice of a pending or putative class action, arising out of the same transaction or occurrence" as the claim at issue before the CCB, the CASE Act requires that party to make an affirmative choice between two options.<sup>68</sup> The party must either "opt out of the class action, in accordance with regulations established by the Register" or "seek dismissal" of the CCB proceeding in writing.<sup>69</sup> The NPRM proposed a 14-day period for a party to either opt out of the class action and provide notice to the CCB or to seek dismissal of the CCB proceeding.<sup>70</sup> The Office received no comments on this portion of the proposed rule and promulgates it without amendment. The Office realizes that the statute does not state what will happen if the party fails to adhere to its obligation to make a timely election. The Office has therefore added a provision clarifying that the CCB may take necessary corrective action to resolve the conflicting proceedings, which may include dismissal of the proceeding without prejudice or, in circumstances where the class action has reached a determination on the merits, vacating any CCB determination. This provision is consistent with the goal of the statute to ensure the timely resolution of a conflicting proceeding by requiring a party to choose to continue with either the CCB proceeding or the class action. It is also consistent with the CCB's power to control its own proceedings, but not federal court class action proceedings.

### **List of Subjects in 37 CFR Part 223**

Copyright, Claims.

### **Final Regulations**

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<sup>68</sup> 17 U.S.C. 1506(q)(3).

<sup>69</sup> *Id.* at 1507(b)(2), 1506(q)(3).

<sup>70</sup> 86 FR at 49277.

For the reasons set forth in the preamble, the Copyright Office amends chapter II, subchapter B, of title 37 Code of Federal Regulations to read as follows:

**Chapter II—U.S. Copyright Office, Library of Congress**

**Subchapter B—Copyright Claims Board, Library of Congress**

1. Under the authority of 17 U.S.C. 702, 1510, the heading for subchapter B is revised to read as set forth above.

2. Part 223 is added to read as follows:

**PART 223—OPT-OUT PROVISIONS**

Sec.

223.1 [Reserved]

223.2 Libraries and archives opt-out procedures.

223.3 Class action opt-out procedures.

**Authority:** 17 U.S.C. 702, 1510.

**§ 223.1 [Reserved]**

**§ 223.2 Libraries and archives opt-out procedures.**

(a) *Opt-out notification.* (1) A library or archives that wishes to preemptively opt out of participating in Copyright Claims Board (“Board”) proceedings under 17 U.S.C. 1506(aa) may do so by submitting written notification to the Board. The notification shall include a signed certification under penalty of perjury that the library or archives qualifies for the limitations on exclusive rights under 17 U.S.C. 108 and the signatory is authorized to submit the form on the library’s or archives’ behalf.

(2) The submission described in paragraph (a)(1) of this section shall list the name and physical address of each library or archives to which the preemptive opt out applies and shall be signed by a person with the authority described in paragraph (c) of this section. The library or archives must also provide a point of contact for future correspondence, including phone number, mailing address, email address, and the website for the library or archives, if available, and shall notify the Board if this information changes.

(3) The Board will accept the facts stated in the submission described in paragraphs (a)(1) and (2) of this section, unless they are implausible or conflict with sources of information that are known to the Board or the general public.

(4) If a Federal court determines that an entity described in paragraph (a)(1) of this section does not qualify for the limitations on exclusive rights under 17 U.S.C. 108, that entity must inform the Board of that determination and submit a copy of the relevant order or opinion, if any, within 14 days after the determination is issued.

(5) An opt-out under this section extends to a library's or archives' employee acting within the scope of their employment, but does not apply to employees acting outside the scope of their employment.

(6) For the purposes of this section, the date that the Board posts the opt-out information on its website as described in paragraph (b) in this section, after receipt, review, and processing of the notification described in paragraph (a)(1) of this section, will be the effective date of a preemptive opt-out election, except as noted in paragraph (a)(9) of this section. A preemptive opt-out election would not compel dismissal of a claim that the Board has found compliant and has instructed the claimant to serve prior to the preemptive opt-out election's effective date. A respondent who wishes to opt out of such a claim should follow the directions provided in the served notice of proceeding.

(7) A library or archives may rescind its preemptive opt-out election under this section, such that it may participate in Board proceedings, by providing written notification to the Board in accordance with such instructions as are provided on the Board's website. A library or archives may submit no more than one such rescission notification per calendar year.

(8) The notification described in paragraph (a)(1) of this section shall be submitted to the Board in accordance with such instructions as are provided on the Board's website.

(9) A blanket opt-out filed by a library or archives in accordance with this section before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will become effective on that date.

(b) *Review of eligibility.* (1) The Board will maintain on its website a public list of libraries and archives that have preemptively opted out of Board proceedings pursuant to paragraph (a) of this section. If the Register determines pursuant to paragraph (a)(3) of this section that an entity does not qualify for the preemptive opt-out provision, the Office will communicate to the point of contact described in paragraph (a)(2) of this section that it does not intend to add the entity to the public list, or that it intends to remove the entity from that list, and will allow the entity to provide evidence supporting its qualification for the exemption within 30 days. If the entity fails to respond, or if, after reviewing the entity's response, the Register determines that the entity does not qualify for the limitations on exclusive rights under section 108 of title 17, the entity will not be added to, or will be removed from, the public list. If the Register determines that the entity qualifies for the limitations on exclusive rights under 17 U.S.C. 108, the entity will be added to, or remain on, the libraries and archives preemptive opt-out list. This provision does not limit the Office's ability to request additional information from the point of contact listed pursuant to paragraph (a)(2) of this section. Any determination by the Register regarding an entity's qualifying status for the limitations on exclusive rights under 17 U.S.C. 108 is solely for the purpose of determining whether the entity qualifies for the preemptive opt out under 17 U.S.C. 1506(aa) and does not constitute a legal conclusion for any other purpose.

(2) A claimant seeking to assert a claim under this section against a library or archives, or an employee thereof acting within the scope of their employment, that it believes is improperly included on the public list described in paragraph (b)(1) of this section may file the claim with the Board pursuant to 17 U.S.C. 1506(e) and applicable

regulations. The claimant must include in its statement of material facts allegations sufficient to support that belief. If the Board concludes, as part of its review of the claim pursuant to 17 U.S.C. 1506(f), that the claimant has alleged facts sufficient to support the conclusion that the library or archives is ineligible for the preemptive opt-out, and the Register agrees, the library or archives will be given an opportunity to provide evidence supporting its qualification for the exemption pursuant to paragraph (a)(1) of this section. If the Register concludes that evidence submitted by the library or archives supports its qualification for the exemption, the library or archives will remain on the list and the associated allegations by the claimant will be stricken. After these allegations are stricken, if the claim includes other respondents and is otherwise complaint, the claimant will be instructed to proceed with service of the claim against the remaining respondents. Alternatively, if the Register concludes that the library or archives has not provided evidence to support its qualification for the exemption, the library or archives will be removed from the blanket opt-out list. The claim will then be reviewed for compliance and, if found to be compliant, the claimant will be instructed to proceed with service of the claim.

(3) Any determination made under paragraph (b)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(c) *Authority.* Any person with the authority to take legally binding actions on behalf of a library or archives in connection with litigation may submit a notification under paragraph (a) of this section.

(d) *Multiple libraries and archives in a single submission.* A notification under paragraph (a) of this section may include multiple libraries or archives in the same submission if each library or archives is listed separately in the submission and the submitter has the authority described under paragraph (c) of this section to submit the notification on behalf of all libraries and archives included in the submission.

### **§ 223.3 Class action opt-out procedures.**

(a) *Opt-out or dismissal procedures.* Any party to an active proceeding before the Copyright Claims Board (“Board”) who receives notice of a pending or putative class action, arising out of the same transaction or occurrence as the proceeding before the Board, in which the party is a class member, shall either opt out of the class action or seek written dismissal of the proceeding before Board within 14 days of receiving notice of the pending class action. If a party seeks written dismissal of the proceeding before the Board, upon notice to all claimants and counterclaimants, the Board shall dismiss the proceeding without prejudice.

(b) *Filing requirement.* A copy of the notice indicating a party’s intent to opt out of a class action proceeding must be filed with the Board within 14 days after the filing of the notice with the court.

(c) *Timing.* The time periods provided in paragraphs (a) and (b) of this section may be extended by the Board for good cause shown.

(d) *Failure to notify Board.* If a party fails to make a timely election under paragraph (a) of this section, the Board is authorized to take corrective action as it deems necessary, which may include dismissal of a pending claim before the Board with or without prejudice, notifying the class action court of any final determination by the Board, or vacating a final determination of the Board. The Board may, in its discretion, direct a party to show cause why action under paragraph (a) of this section was not taken.

**Dated:** February 28, 2022.

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**Shira Perlmutter,**

*Register of Copyrights and*



*Director of the U.S. Copyright Office.*

Approved by:

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**Carla D. Hayden,**

*Librarian of Congress.*

**[BILLING CODE 1410-30-P]**

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